Office-Supreme Court, U.S.
FILED
NOV 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-562

IN THE

Supreme Court of the United States

October Term, 1983

JOHN DEAN, Petitioner

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, Respondents

BRIEF OF TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Douglas G. Mooney
Elizabeth G. Filipow
BOGLE & GATES
The Bank of
California Center
Seattle, WA 98164
(206) 682-5151

Of Counsel

James H. Lowe
BOGLE & GATES
The Bank of
California Center
Seattle, WA 98164
(206) 682-5151

Counsel of Record
for Respondent
Trans World
Airlines, Inc.

QUESTION PRESENTED

Did the court of appeals err in its holding that an employee obligated to pay agency fees in lieu of union dues could not unilaterally reduce his payments, even though he believed the union was making political expenditures to which he objected?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below.	1
Jurisdiction.	2
Applicable Statutes and Rules . . .	2
Statement of the Case	3
Summary of Argument	7
Argument	9
I. The Supreme Court Lacks Jurisdiction Because the Petition for Writ of Certiorari Was Not Timely Filed.	9
II. The Petition for Writ of Certiorari Should Be Denied Because No Important Federal Question Has Been Presented	13
A. The Alleged Violation of Petitioner's Constitutional Rights Was Neither Raised Nor Addressed in the Court of Appeals. . .	13

Page

B. The Issue Actually Decided by the Court of Appeals Has Already Been Addressed By This Court 14

III. The Petition For Writ of Certiorari Should Be Denied Because the Alleged Conflict in the Circuits Has Not Been Demonstrated and Is Immaterial to the Question Presented 18

Conclusion 22

Appendix A. A-1

Appendix B. A-3

Appendix C. A-5

TABLE OF AUTHORITIES

Cases

	Page
Abood v. Detroit Board of Education, 431 U.S. 209 (1976)	17,18,21
Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113 (1963)	17,21
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	13
Department of Banking v. Pink, 317 U.S. 264 (1942)	9
International Association of Machinists v. Street, 367 U.S. 740 (1961)	16,17,21
International Union, Etc. v. NLRB. 675 F.2d 1257 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 816 (1983).	19,20
J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981)	14
Miree v. De Kalb County, 433 U.S. 25 (1977)	13

Page

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923) 9

Statutes

28 U.S.C. § 2101(c) 2,9,12

45 U.S.C. § 152, Eleventh 5

45 U.S.C. § 181 5

Rules of Procedure

Federal Rule of Appellate Procedure 35. 10,11

Federal Rule of Appellate Procedure 40. 11

Supreme Court Rule 19.3 7

Supreme Court Rule 20 9,10

Supreme Court Rule 28.1 3

No. 83-562

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

JOHN DEAN, Petitioner

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, Respondents

BRIEF OF TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Trans World Airline, Inc. respectfully requests that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at Dean v. Trans World Airlines, Inc., 708 F.2d 486 (9th Cir.

June 16, 1983), and is reproduced at pages 2-4 of the Appendix to the Petition for Writ of Certiorari. The court of appeals' Order rejecting the petitioner's suggestion for en banc rehearing, entered on August 25, 1983, is unreported and is reproduced at page 1 of the Appendix to the Petition.

JURISDICTION

This Court does not have jurisdiction to review this case on a writ of certiorari, because the Petition for Writ of Certiorari was not filed within the time limits required by 28 U.S.C. § 2101(c), as explained in the Argument at 9-12 infra.

APPLICABLE STATUTES AND RULES

The applicable statutes and procedural rules are set forth in Appendix C to Trans World Airlines, Inc.'s Brief in Opposition.

STATEMENT OF THE CASE

In 1975 Trans World Airlines, Inc. ("TWA")[1] and Air Line Pilots Association, International ("ALPA") signed a collective bargaining agreement containing an agency shop provision (Pet. at A-11).[2] The agency shop provision required TWA pilots who did not join the union to pay ALPA a service charge in an amount equal to union dues as a condition of continuing employment (Exhibit 82, Pet. at A-41). Throughout 1976 petitioner Dean, a TWA pilot at the time, demanded a reduction in these charges, based upon his belief that ALPA

---

[1] In compliance with Supreme Court Rule 28.1, TWA discloses that its parent company, Trans World Corporation, owns 80% of TWA stock. The remaining 20% is publicly traded, but no other stockholder owns more than 10% of the total shares outstanding.

[2] "Pet. at A" refers to the Appendix to the Petition for Writ of Certiorari.

was making expenditures not directly related to the TWA-ALPA collective bargaining agreement. ALPA denied that it was making expenditures for political contributions or unlawful purposes, and therefore refused to reduce the amount of Dean's agency service charge (Exhibit 15, Pet. at A-37-38).

In January of 1977, the petitioner began to pay approximately 25% of his monthly agency fee, a percentage Dean arbitrarily determined to be the amount ALPA could legitimately bill him. Dean continued to pay only 25% of his service charge through June of 1977 (Pet. at A-7). ALPA then notified Dean that he was delinquent in his agency fees, and advised him that if the delinquency was not cured Dean would be discharged (Pet. at A-38-39). Because the delinquency was not cured in a timely manner, ALPA

requested that TWA discharge Dean pursuant to Section 3-B of the collective bargaining agreement (Exhibit 78, Pet. at A-40-41). TWA complied and Dean's employment was terminated on August 12, 1977 (Pet. at A-3).

Dean filed an action in the District Court for the Western District of Washington seeking back pay and reinstatement and alleging violations of the Railway Labor Act, 45 U.S.C. § 152, Eleventh and 45 U.S.C. § 181. Dean alleged that ALPA had breached its duty of fair representation and TWA had breached the collective bargaining agreement by discharging him for nonpayment of his agency fees (Pet. at A-5). The district court granted summary judgment in favor of Dean on the issue of liability, holding that by seeking Dean's discharge for nonpayment of agency fees, ALPA had breached

its duty of fair representation. The district court then held that because ALPA had wrongfully sought Dean's discharge, TWA was also liable to Dean for breach of the collective bargaining agreement. The district court therefore issued a permanent injunction ordering Dean's immediate reinstatement (Pet. at A-8, 9, 17).

The United States Court of Appeals for the Ninth Circuit reversed, holding that the district court had erred in granting summary judgment because Dean remained obligated under the agency-shop agreement, and therefore could not unilaterally reduce his fee payments (Pet. at A-4). The court of appeals remanded the case to the district court for trial of the remaining issues (Pet. at A-4). The judgment of the court of appeals was entered on June 16, 1983. Dean filed a Motion for En Banc Rehearing (App. at

A-3), which was denied on August 25, 1983 (App.[3] at A-1).[4] Dean filed a Petition for Writ of Certiorari on October 1, 1983.[5]

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should not be granted for the following three reasons.

---

[3]"App" refers to the Appendix to the TWA's Brief in Opposition to the Petition for a Writ of Certiorari.

[4]Dean asserts in the Petition that his "motion for rehearing and suggestion for rehearing en banc" were denied by the court of appeals. See "Jurisdiction," Pet. at v. However, the Order of the court of appeals makes clear that only a suggestion for rehearing en banc was considered and denied, and that no petition for rehearing was filed. See Order, App. at A-1-2.

[5]TWA was not served with copies of the Petition for Writ of Certiorari before filing, as is required by Sup. Ct. R. 19.3. In fact, copies of the Petition were sent only after counsel for TWA requested copies from petitioner's attorney. The petitioner also failed to notify TWA of either the date of filing or the docketing number of his Petition, as is required by Sup. Ct. R. 19.3.

First, this Court lacks jurisdiction to hear the case because the Petition was not timely filed.

Second, the Petition presents no important federal question which this Court should determine. No constitutional issue was either raised or addressed in the courts below, and thus the constitutional issues raised in the Petition for Writ of Certiorari should not be considered by this Court at the present time. The issue actually decided by the court of appeals has already been addressed by this Court in prior decisions. Because the holding of the Ninth Circuit follows those decisions, it need not be reviewed on certiorari.

Third, the alleged conflict, which petitioner has not demonstrated, is irrelevant to the determination of any issue before this Court. Thus, this

Court need not grant the writ of certiorari to resolve a conflict among the circuits.

ARGUMENT

I. The Supreme Court Lacks Jurisdiction Because the Petition for Writ of Certiorari Was Not Timely Filed.

Section 2101(c) of Title 28 of the U.S. Code requires that a petition for certiorari in a civil action be filed within 90 days of the time judgment is entered.[6] This Court has held that it has no jurisdiction to consider a petition for certiorari brought pursuant to 28 USC § 2101(c) which is not timely filed. Department of Banking v. Pink, 317 U.S. 264, 268 (1942); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923). Also, Supreme Court

---

[6]Dean erroneously asserts that a 60-day period applies to his Petition for Writ of Certiorari. See "Jurisdiction," Pet. at v.

Rule 20.3 states that a petition which is jurisdictionally out of time will not be received.

In this case, the applicable 90-day period began running upon entry of the judgment of the court of appeals, because no petition for rehearing was filed. Supreme Court Rule 20.4 states that the time for filing a petition for certiorari runs from the date judgment is entered unless "a petition for rehearing is timely filed." Dean asserts that the 90-day period began to run on August 25, 1983, the date of the Ninth Circuit's order denying his suggestion for en banc rehearing (Pet. at v). However, a suggestion for en banc rehearing does not affect the finality of an appellate court judgment and thereby cause the 90-day period to begin to run anew. Rule 35 of the Federal Rules of Appellate Procedure

specifically differentiates between a petition for rehearing and a suggestion for rehearing en banc, and states that a suggestion for rehearing en banc does not affect the finality of a judgment of a court of appeals. While Dean asserts that a motion for rehearing[7] was denied, the Ninth Circuit's order denying en banc rehearing leaves no doubt that a suggestion for en banc rehearing was received and denied and that no petition for rehearing was filed. See Order (Pet. at A-1). Even if Dean believed he had filed a petition for rehearing, and thus caused the 90-day

---

[7]The petitioner filed what he styled a "motion for en banc rehearing." App. at A-3. The court of appeals determined that the motion was a "suggestion for rehearing en banc." See Order, App. at A-1. Compare Fed. R. App. P. 35 with Fed. R. App. P. 40.

period to begin to run anew, he was on notice that this belief was incorrect from August 25, 1983, the date of the denial of the en banc rehearing. Because the 90-day period did not expire until September 14, 1983, Dean had ample opportunity to either file a timely petition or request an extension of time. He did neither.

The 90-day period for timely filing in this case began to run on the date the Court of Appeals for the Ninth Circuit entered its judgment, June 16, 1983. Dean's Petition for a Writ of Certiorari was filed on October 1, 1983, 107 days after entry of that judgment and not within the 90-day period established by § 2101(c). This Court should therefore dismiss the petition for lack of jurisdiction.

II. The Petition For Writ of Certiorari Should Be Denied Because No Important Federal Question Has Been Presented.

A. The Alleged Violation of Petitioner's Constitutional Rights Was Neither Raised Nor Addressed in the Court of Appeals

In order to review and decide questions on a writ of certiorari, this Court has required that such questions be raised in and addressed by the court whose judgment is being reviewed. Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981); Miree v. De Kalb County, 433 U.S. 25 (1977). Although Dean's Petition for Writ of Certiorari raises the question whether Dean's First and Fifth Amendment rights were violated by the respondents' actions, this question was neither raised nor addressed in the court of appeals. (See Pet. at

A-2-4).[8] Therefore, this Court should refuse to grant a writ of certiorari to review the constitutional issues presented in Dean's Petition.

B. The Issue Actually Decided by the Court of Appeals Has Already Been Addressed By This Court

The court of appeals ruled that the district court erred in granting summary judgment in favor of Dean because Dean "did not pursue the proper avenue of redress for his grievance." (Pet. at A-4). The court of appeals held that when an employee who is obligated to pay

---

[8]Nor was this issue raised or addressed in the district court. See Order Granting Plaintiff's Motion for Partial Summary Judgment, Pet. at A-5; Findings of Fact and Conclusions of Law, id. at A-11; Order on Motion for Permanent Injunction, id. at A-14. For this reason it would be inappropriate to remand the case to the court of appeals for decision on the constitutional issue. See J. Truett Payne Co. Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

a fee to a union under an agency-shop agreement objects to expenditures by the union, he may not unilaterally reduce or stop his fee payments. Instead he must pursue judicial relief through an action seeking either a rebate for political and ideological expenditures or a narrowly drawn injunction prohibiting the use of a portion of his fees for political and ideological expenditures. Id. Because Dean had not sought judicial relief by either of those two methods, but had unilaterally reduced the payments due under the agency-shop agreement, the court of appeals ruled that the district court could not grant summary judgment holding ALPA and TWA liable for the unlawful discharge of Dean. Id.

That ruling presents no important question that this Court must answer,

because this Court has already determined what remedies a dissenting employee, such as Dean, may pursue. This Court first held that a union may not expend dues for political and ideological purposes to which an employee voices objection in International Association of Machinists v. Street, 367 U.S. 740 (1961). However, in Street this Court delineated the two remedies available to protesting employees: to seek either a rebate for political and ideological expenditures or an injunction prohibiting the expenditure of a portion of the dues for political and ideological purposes. Id. at 774-75. This Court held that protesting employees should not be permitted to take alternative action such as withholding payment of dues because this would interfere too greatly

with legitimate union functions. Id. at 771. Thus, the Court stated:

> ...[protesting employees] therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement.

Id.

This Court reiterated the two remedies available to protesting union members in Brotherhood of Railway and Steamship Clerks v. Allen, and again held that protesting employees were not released from their dues-paying obligations, stating that such employees "can be entitled to no relief until final judgment in their favor is entered." 373 U.S. 113, 120 (1963). Finally, in the case of Abood v. Detroit Board of Education, 431 U.S. 209 (1976), this Court found that the same two remedies were appropriate for dissenting employees not members of the union, but

obligated to pay fees under an agency-shop agreement. Id. at 242.

Dean's contention that the court of appeals erred in holding that Dean was not entitled to unilaterally reduce his agency fee payments is simply not a contention that merits this Court's review on certiorari, because the issue has been resolved in previous cases.

III. The Petition for Writ of Certiorari Should Be Denied Because The Alleged Conflict in the Circuits Has Not Been Demonstrated and is Immaterial to the Question Presented for Certiorari.

Dean alleges that there is a conflict among the circuits in that some circuit courts recognize a distinction between agency-shop and union-shop arrangements, while other circuit courts do not (Pet. at 4). However, the petitioner has not demonstrated that such a conflict actually exists. The only two

circuit court decisions cited by the petitioner for this proposition are the Ninth Circuit's opinion in the instant case and the District of Columbia Circuit's opinion in International Union, Etc. v. NLRB, 675 F.2d 1257 (D.C.Cir. 1982), cert. denied, 103 S. Ct. 816 (1983). To establish the conflict, the petitioner has quoted a passage from International Union referring to differences between membership dues and representation fees (Pet. at 4). However, the petitioner has failed to note that this quotation is from the dissenting opinion. See 675 F.2d at 1279 (Mikva, J., dissenting). The holding in the majority opinion does not stand for the proposition that there is a distinction between representation fees and union dues. See 675 F.2d 1257 (holding that because representation fee assess-

ments on non-union employees are banned by right-to-work laws, they are not mandatory subjects of bargaining; thus insistence upon them by the union amounts to an unfair labor practice). As no other case has been cited to show a conflict with the Ninth Circuit's opinion, no conflict has been demonstrated.

More importantly, whether there is a distinction between fees paid under an agency-shop agreement and dues paid under a union-shop agreement is irrelevant to the determination of the question presented to this Court by the Petition for Writ of Certiorari. This Court has recognized that the rationale underlying its limitation on remedies for union members protesting expenditure of dues mandates the same limitation on remedies for non-union members protesting expenditure of agency representation

fees. See Abood, 431 U.S. at 237-238. The same damage to union stability would result if non-union members could unilaterally withhold representation fees as results when union members withhold dues. This Court specifically addressed this issue in Abood where it held that only remedies which do not restrict ". . . the Union's ability to require every employee to contribute to the cost of collective bargaining activities," such as the two limited remedies delineated in Street and Allen, should be available to protesting non-union employees obligated to pay agency fees. Id. at 237-42.

The only issue decided by the court below was that Dean was not entitled to summary judgment because he had not pursued the correct remedies, but had unilaterally reduced his agency fee pay-

ments. Because the alleged conflict in the circuits as to whether there is a distinction between agency fees and union dues is irrelevant to the correct determination of that issue, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated above, respondent TWA respectfully requests that the Petition for Writ of Certiorari be denied.

DATED October 28, 1983.

Respectfully Submitted,

DOUGLAS G. MOONEY
ELIZABETH G. FILIPOW
BOGLE & GATES
The Bank of
California Center
Seattle, WA 98164

Of Counsel

JAMES H. LOWE
BOGLE & GATES
The Bank of
California Center
Seattle, WA 98164

Counsel of Record

APPENDIX A

FILED
AUG 25 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DEAN,	)	No. 82-3133
Plaintiff-Appellee,	)	D.C. # C78-439M
vs.	)	ORDER
TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
Defendants-Appellants.	)	

Before: BROWNING, Chief Judge, FLETCHER and POOLE, Circuit Judges.

The panel as constituted in the above-entitled case has voted to reject the suggestion for rehearing en banc. No petition for rehearing was requested.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a

vote on the suggestion. Fed. R. App. P. 35(b).

The suggestion or rehearing en banc is rejected.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DEAN, Plaintiff-Appellee, vs. TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association, Defendants-Appellants.	)	No. 82-3133 APPELLEE'S MOTION FOR EN BANC REHEARING

COMES NOW the appellee, JOHN DEAN, by and through his attorney of record, L. S. EDMONDSON, and moves the court for an en banc rehearing of this case.

An en banc rehearing is necessary because two decisions of this court, Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970) and Seay vs. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. 1976), were not considered and

were effectively overruled without discussion by the court's opinion.

Respectfully submitted,

/s/

L. S. EDMONSON
Attorney for Appellee
1100 Puget Sound Bank Bldg.
Tacoma, Washington 98402

APPENDIX C

28 U.S.C. § 2102(c)

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

45 U.S.C. § 181

All of the provisions of sections 151 to 152 and 154 to 163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every

carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

SUPREME COURT RULE 19.3

Counsel for the petitioner shall enter an appearance, pay the docket fee, and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date

of filing and of the docket number of the case. Such notice shall be served as required by Rule 28.

SUPREME COURT RULE 20

.1 A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2 A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

.3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4 The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5 A cross-petition for writ of certiorari shall be deemed in time when it is fled as provided in paragraphs .1,

.2, and.4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6 An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

SUPREME COURT RULE 28.1

Pleadings, motions, notices, briefs, or other documents or papers required or permitted to be presented to this Court or to a Justice shall be filed with the Clerk. Any document filed by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance. Any document, except a joint appendix or a brief amicus curiae, filed by or on behalf of one or more corporations, shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation. This listing may be done in a footnote. If such listing has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only

amendments to the listing to make it currently accurate need to be included in the document currently being filed.

FEDERAL RULE OF APPELLATE PROCEDURE 35

Rule 35. Determination of Causes by the Court in Banc.

(a) WHEN HEARING OR REHEARING IN BANC WILL BE ORDERED. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) SUGGESTION OF A PARTY FOR HEARING OR REHEARING IN BANC. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) TIME FOR SUGGESTION OF A PARTY FOR HEARING OR REHEARING IN BANC; SUGGESTION DOES NOT STAY MANDATE. If a party desires to suggest that an appeal be heard initially in banc, the sugges-

tion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

FEDERAL RULE OF APPELLATE PROCEDURE 40

Rule 40. Petition for Rehearing.

(a) TIME FOR FILING; CONTENT; ANSWER; ACTION BY COURT IF GRANTED. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition

shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) FORM OF PETITION; LENGTH. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by a local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.